

FROZEN HEAD STATE PARK ASSOCIATION ET AL.

IBLA 86-246

Decided April 7, 1988

Appeal from a decision of the Director, Office of Surface Mining Reclamation and Enforcement, holding that an unsuitability determination made by the Commissioner of the Tennessee Department of Health and Environment would no longer be recognized.

Affirmed as modified.

1. Surface Mining Control and Reclamation Act of 1977: Areas Unsuitable for Surface Coal Mining: Areas Designated Pursuant to Petition--Surface Mining Control and Reclamation Act of 1977: Federal Program: Prohibition of Mining Operations--Surface Mining Control and Reclamation Act of 1977: Prohibition of Mining Operations: Generally

Regulation 30 CFR 942.764(c) is properly construed to mean that final unsuitability designations made under the Tennessee State program shall remain valid unless and until terminated.

APPEARANCES: Carol S. Nickle, Esq., Knoxville, Tennessee, for appellants; Lewis F. Foster, Jr., Esq., Barry K. Maxwell, Esq., Knoxville, Tennessee, for Emory River Land Company; Beverly Perry, Esq., Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement; and Frank J. Scanlon, Deputy Attorney General, Nashville, Tennessee, for the State of Tennessee.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

The Frozen Head State Park Association, Donald E. Todd, Mary Ann McPeters, William E. Arnes, Tennessee Citizens for Wilderness Planning, and the Sierra Club have appealed from a decision of the Director, Office of Surface Mining Reclamation and Enforcement (OSMRE), dated November 25, 1985, holding that OSMRE would no longer recognize as valid a decision of the Commissioner, Tennessee Department of Health and Environment, designating certain lands 1/ as unsuitable for all types of surface coal mining operations.

1/ The lands at issue are within the Flat Fork watershed and are adjacent to Frozen Head State Park. The area of these lands is approximately 9 square miles in Morgan County, Tennessee.

The Commissioner's decision, dated April 16, 1984, was issued under the authority of | 59-8-331(a)(3) of the Tennessee Code Annotated (T.C.A.), a statute subsequently repealed by the Tennessee General Assembly effective October 1, 1984. 2/ The Commissioner's decision was reached after a public hearing held on January 23, 1984.

Repeal of T.C.A. | 59-8-331(a)(3) occurred during the pendency of an administrative appeal of the Commissioner's ruling filed by Emory River Land Company 3/ with the Tennessee Board of Reclamation Review. Emory owns land that the Commissioner designated as unsuitable for coal operations. On the effective date of repeal, OSMRE published in the Federal Register the following statement:

14. Previous State Decisions on Petitions for Lands Unsuitable for Mining. The State has considered and decided two petitions to designate lands as unsuitable for surface coal mining. One petition was granted, the other denied. Both, however, are under administrative review. The Federal Act provides no guidance on the extent to which a decision by a State on a petition must be recognized by OSM in the situation at hand. Several commenters recommended that OSM ratify or accept the decision of the Tennessee Commissioner of Health and Environment on both of these, the "Flat Fork Watershed" [site of the lands in this appeal] and the "Douglas Branch" lands unsuitable petitions.

OSM has accepted these comments. OSM will implement these two decisions unless and until those decisions are altered as a result of administrative review or of any subsequent petitions to designate or to terminate a designation. See Section 942.764(c). [Emphasis added.]

The above statement was part of a preamble to regulations that form the present Federal program for the State of Tennessee. Regulation 30 CFR 942.764, effective October 1, 1984, provides that "[u]nsuitability designations made under the Tennessee State program shall remain valid unless and until terminated." Approval of the Tennessee State program was withdrawn by OSMRE on the same date this regulation became effective.

By decision of August 22, 1985, the Board of Reclamation Review dismissed Emory's appeal and adopted certain findings and conclusions of

2/ Chapter 837, Public Acts of 1984.

3/ In addition to Emory, appeals were filed by Willard and Pauline Goodman and by appellants herein.

Administrative Judge David E. Thompson. ^{4/} Judge Thompson, relying on an opinion of the Tennessee Attorney General, ^{5/} had concluded that the Board of Reclamation Review did not have jurisdiction to hear Emory's appeal. This conclusion was based on the Attorney General's view that the Board was divested of jurisdiction to hear pending appeals, such as Emory's, by the General Assembly's repeal of T.C.A. | 59-8-331. Judge Thompson also noted that the Attorney General had opined that determinations made by the Commissioner under T.C.A. | 59-8-331 and pending appeal to the Board of Reclamation Review on October 1, 1984, were void and of no effect under State law.

Following the Board's decision of August 22, 1985, appellants filed a motion with OSMRE urging it to recognize, defer to, and uphold the Commissioner's decision that the Flat Fork lands are unsuitable for coal mining. In this motion, appellants quote from the preamble language set forth above in which OSMRE stated that it would implement the Commissioner's decisions "unless and until those decisions are altered as a result of administrative review or of any subsequent petitions to designate or to terminate a designation." Appellants contend that the Commissioner's unsuitability determination affecting the Flat Fork watershed became final when the Board of Reclamation Review declined to review the merits of Emory's appeal for want of jurisdiction. The Attorney General's view that the Commissioner's decision was null and void under State law is irrelevant, in appellants' view.

OSMRE's response to appellants' motion is the decision on appeal. In this response, the Director states:

Regarding the Petitioners' [appellants herein] allegations, OSM agreed to implement the determination only insofar as the determination was not terminated. The April 1, 1985 Attorney General's opinion and the subsequent Board decision terminated the Flat Fork unsuitability designation. Therefore, as provided in 30 CFR 942.764(c), the Commissioner's April 16, 1984 Flat Fork unsuitability designation will no longer be recognized by OSM as valid. In reaching this conclusion, OSM has determined that this course of action will protect the Petitioners' rights because they have refiled their petition with OSM for decision. No permit to mine can be issued while the petition is pending.

In their statement of reasons on appeal, appellants argue that the Commissioner's decision has neither been altered administratively nor terminated. No decision was rendered on the merits of Emory's appeal, appellants contend, because the Board of Reclamation Review held that it lacked

^{4/} Judge Thompson is an Administrative Judge of the Administrative Procedures Division, Office of the Secretary of State. His findings and conclusions are set forth in an Initial Order, dated Apr. 12, 1985.

^{5/} This opinion was issued on Apr. 1, 1984, in response to an inquiry from the Commissioner.

jurisdiction in the matter. Appellants further argue that OSMRE misinterprets the Attorney General's opinion. Though acknowledging that the Attorney General characterized the Commissioner's decision as "void and of no effect under State law," appellants point out that the Attorney General also found the decision to be "valid and enforceable under Federal law" because of the Secretary's adoption of this decision (Op. Att'y Gen. at 2). Appellants also call our attention to the Attorney General's view that 30 CFR 942.764(c) "makes it clear that the Secretary has carried forward, as his own, previous designations of the Commissioner of the Department of Health and Environment as to areas in Tennessee unsuitable for surface mining." Id. at 16.

Emory responds to appellants' arguments by stating that 30 CFR 942.764(c) reveals OSMRE's intention to implement the Commissioner's unsuitability designation only as long as the designation remained in full force and effect under Tennessee law. To argue to the contrary, Emory contends, is "to argue that OSM has the power to recognize and enforce a void state designation which Tennessee's highest legal officer, i.e., the Attorney General, clearly recognizes as having no force or effect under Tennessee law" (Answer, Jan. 24, 1986, at 9-10). Emory next argues that the Commissioner's designation was, in fact, terminated "as a result of administrative review" because its (Emory's) request for administrative review prevented the designation from becoming final. Had the designation become final, OSMRE would have recognized and implemented the Commissioner's decision. Id. at 11.

Emory further argues that to make the Commissioner's decision binding on it would deny it the due process rights afforded by an adjudicatory hearing. The public hearing afforded by Tennessee regulation 0400-1-9-.08, Emory states, was legislative and fact-finding in nature and provided Emory no opportunity to cross-examine. Had its appeal been reviewed by the Tennessee Board of Reclamation Review, Emory states, it would have been entitled to a hearing "adjudicatory in nature" and afforded due process rights (Answer at 16).

OSMRE has filed a brief contending that the Director's decision is correct because OSMRE cannot validate a decision that, for want of an administrative appeal, never became final. Had the Director held otherwise, OSMRE contends, Emory's administrative appeal rights would have been cut off.

Finally, the State of Tennessee argues that the Commissioner's decision should be upheld because it was never altered as a result of administrative review or by a subsequent petition to terminate.

Our resolution of this case begins with 30 CFR 942.764(c): "Unsuitability designations made under the Tennessee State program shall remain valid unless and until terminated." This regulation became effective on October 1, 1984, the same day that approval of Tennessee's State program was withdrawn and OSMRE's Federal program commenced. Though it is clear

that an unsuitability designation affecting the Flat Fork watershed was made under the Tennessee State program, this designation never became final because of Emory's appeal.

The preamble to 30 CFR 942.764(c), quoted above, reveals OSMRE's understanding that the Commissioner's designation was "under administrative review" by the Board of Reclamation Review. OSMRE's statement that it would implement the Commissioner's decision "unless and until [this decision was] altered as a result of administrative review" indicates that OSMRE believed that administrative review by the Board of Reclamation Review would not be halted by withdrawal of approval of the Tennessee State program. Thus it appears that OSMRE's decision to implement the Commissioner's decision was based on the assumption that this decision would be reviewed on its merits by the Board of Reclamation Review and a final State decision issued. This never occurred.

[1] In light of this background, it is appropriate to construe 30 CFR 942.764(c) to mean that final unsuitability designations made under the Tennessee State program shall remain valid unless and until terminated. The termination referred to in this regulation would occur, if at all, in accordance with 30 CFR 942.764 and 30 CFR 764.13(c). There being no final decision affecting the Flat Fork watershed, OSMRE may properly refuse to recognize the Commissioner's decision. The Director's decision of November 25, 1985, is, accordingly, affirmed as modified herein.

This construction avoids OSMRE's adoption of a decision reached without providing Emory the adjudicatory hearing required by T.C.A. | 59-8-321(g)(2). Though the scope of such a hearing before the Board of Reclamation Review is unclear, 6/ its adjudicatory nature is consistent with OSMRE's minimum procedures and standards set forth at 30 CFR 764.17. This regulation, which was in effect as of October 14, 1983, amended an earlier regulation that called for a legislative hearing to consider a nonsuitability petition. The revised regulation gave the regulatory authority a broader range of hearing procedures. These procedures were described by OSMRE as appropriate for a formal or quasi-judicial hearing. 48 FR 41312, 41336 (Sept. 14, 1983). Under the revised regulation, the regulatory authority could subpoena witnesses, and cross-examination of expert witnesses could take place.

Under the procedures in place at the Tennessee public hearing on January 23, 1984, Emory was denied the right of cross-examination, and

6/ In connection with such hearing, the chairman, Board of Reclamation Review, was authorized to issue subpoenas in response to any reasonable request by a party. Such subpoenas could require the attendance and testimony of witnesses and production of evidence. T.C.A. | 59-8-321(g)(4), since repealed.

no authority existed in the regulatory authority to subpoena witnesses. To adopt the Commissioner's decision in such a situation is to ignore the procedural protections that both the State and OSMRE sought to offer to Emory before any decision affecting its land became final.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Director is affirmed as modified.

Franklin D. Arness
Administrative Judge

We concur:

C. Randall Grant, Jr.
Administrative Judge

Wm. Philip Horton
Chief Administrative Judge